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Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, A.D., 1970

HAROLD BEAN and ROBERT WILKINSON,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Opinion of the Appellate Court 1

No.

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(a) REFERENCE TO REPORTS OF OPINIONS

People v. *Bean and Wilkinson,* 121 Ill. App. 2d 270, 257 N.E. 2d 558

(b) STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Appellate Court was entered on March 9, 1970. Petition for a rehearing was denied on April 6, 1970. Petition for leave to appeal was seasonably filed in the Supreme Court of Illinois on May 18, 1970. Petition for leave to appeal was denied without opinion on November 12, 1970. Jurisdiction of this Court is invoked under Title 28, U.S.C. Sec. 1257 (3).

(c) QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Illinois Appellate Court properly applied the tests of the following case in determining the sufficiency of the evidence in sustaining the defendants' conviction.

In Re Winship, 90 S.Ct. 1068

(2) Whether the "rational connection" tests of the following cases are equally applicable to evidentiary presumption and inferences as well as statutory presumptions.

Tot v. *U.S.,* 319 U.S. 463
Romano v. *U.S.,* 382 U.S. 136
Leary v. *U.S.,* 395 U.S. 6
U.S. v. *Adams,* 293 F. Supp. 776
In Re Winship, 90 S.Ct. 1068

(d) CONSTITUTIONAL PROVISIONS INVOLVED

The due process clauses of the Fifth and Fourteenth Amendments.

(e) STATEMENT OF THE CASE

The State was able to establish the following facts by direct evidence.

(1) On the night of October 14, 1966 at approximately 2:15 a.m. an alarm signal was activated at the Village of Lyons police station.

(2) Shortly thereafter members of the Village of Lyons, Illinois Police Department arrived at the location of the Stitt-Reed Corporation in the Village of Lyons, Illinois in response to the signal and found the defendants lying on the adjoining prairie approximately thirty-five feet from the building itself.

(3) Upon inspection at the scene by the police and one Albert Guetler, an officer of the Stitt-Reed Corporation, Guetler discovered two pins lying on the ground near the rear door.

(4) That an instrument characterized as, but never proven to be, a bolt cutter was also found at the scene near the defendant Bean.

The defendants, through cross-examination, were able to prove the following facts.

(1) That Guetler (the officer of the Stitt-Reed Corporation) did not see the pins found near the rear door of the building in their hinges prior to arriving at the building sometime after 2:15 a.m., October 14, 1966.

(2) That when one of the police officers (Burton Stieg) checked the front and rear doors of the building on October 14, 1966, after arriving in response to the alarm, he found them to be secure. Further, there was no physical damage whatever to the building itself.

Most importantly the State never attempted to prove directly or circumstantially that if the pins had actually been in the rear door on the morning of October 14, 1966 their removal could or would have activated the alarm.

(f) RAISING OF THE FEDERAL QUESTION

The Illinois Appellate Court, in its decision, violated this Court's decision in *In Re Winship,* 90 S.Ct. 1068 by allowing the defendants' conviction to stand on certain evidentiary presumptions which violate the requirement of proof beyond a reasonable doubt to sustain a conviction for a criminal offense.

(g) PROCEEDINGS IN FEDERAL COURT

(none)

(h) REASONS FOR GRANTING THE WRIT

(A) It is the contention of the defendants that their conviction rests on evidence which is insufficient to satisfy the now constitutionally protected burden of proof in criminal cases, as announced in this Court's decision in *In Re Winship,* 90 S.Ct. 1068. The facts are set out in paragraph (e) of this writ as well as in the decision rendered by the Illinois Appellate Court in *People of the State of Illinois* v. *Bean and Wilkinson,* 121 Ill. App. 2d 170, 257 N.E. 2d 558. The defendants' specific complaint is that the State's chain of evidence was fatally defective in the following particulars.

(1) The State was unable to prove directly that the pins which were discovered lying on the ground by Albert Guetler, the vice-president of the premises allegedly intended to be burglarized by the defendants, were in the rear door prior to the apprehension of the defendants in the grass nearby the aforesaid premises. At trial, Guetler admitted on cross-examination that he had not seen the pins in the door prior to arriving there after the defendants had been apprehended and then finding the pins on the ground. Guetler, however, maintained that if the pins had not been in the door it would not have locked.

(2) A police officer who testified for the State (Officer Burton Stieg of the Village of Lyons Police Department) admitted on cross-examination that on the night in question, shortly before the defendants were apprehended and after arriving at the scene in response to the alarm which had been activated at the Village of Lyons police station, when he checked the rear door, he found it to be secure.

It is clear then that, consistent with the requirements of proof beyond a reasonable doubt, at this point and upon this testimony the State had failed to prove that the pins were in the rear door prior to some time after 2:15 a.m. on October 14, 1966. It is also painfully obvious that the only other way that the State could prove that the pins were in the door would be through the use of circumstantial evidence which, if satisfactory, would allow the trier of fact to infer from other circumstances that the pins were in the door prior to the date and time in question. Specifically, the State merely had to show that, given the fact that the pins were in the door, that their removal from the door would cause the alarm to be activated. It is abundantly clear that the State never attempted to prove directly or indirectly that this was the case. This was the precise contention that the defendants raised on appeal before the Illinois Appellate Court. The Illinois Appellate Court, in *People* v. *Bean and Wilkinson, supra,* dealt with this contention at p. 561 of their opinion.

> "The record shows that the trial judge had to rely upon *reasonable* inferences from the evidence presented. According to the case of *People* v. *Jackson,* 98 Ill.App.2d 296, at page 305, 240 N.E.2d 482, at page 485 (1968), 'the trier of fact is not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt.' Similarly, our Supreme Court has expressed this same principle in connection with jury determination. *People* v. *Russell,* 17 Ill.2d 328, 161 N.E.2d 309 (1959).
>
> The trial judge relied upon several natural inferences in finding the defendants guilty. The record shows that the defendants were arrested within close proximity to a building where a burglar alarm had

sounded. It can be reasonably inferred that the removal of the pins activated the alarm. We think that the trial judge was correct in ignoring the inference sought to be presented by the defendants that no proof was shown that the pins had not been removed prior to the early morning of October 14, 1966. The fact that Guetler checked the rear door on October 13, 1966, but failed to observe the outside of the rear door where the hinges are located does not lead to the conclusion that the pins were not present. It can be reasonably assumed that had they been removed on October 13, 1966, the burglar alarm would have sounded.

Furthermore, the testimony was that there were no places of business in the near vicinity that were open at the times the defendants were arrested. Although the defendants were not obligated to explain their presence at the scene, this circumstance when considered with the other facts weighs heavily against their innocence. The admission of the alleged bolt cutter found near defendant Bean was a substantial factor for the court's consideration even though it was not asserted that the instrument was used to commit the offense. *People* v. *Hahn,* 90 Ill.App. 2d 367, 234 N.E.2d 142 (1967)."

Thus, the narrow question presented for this Court is whether or not the "natural inference," "reasonable inference" or "reasonable assumption" by the Illinois Appellate Court that the pins had been removed from the door on the night of October 13 or the morning of October 14, 1966 is violative of the standard established in *In Re Winship, supra.*

It is clear that the reasonable assumption to which the Illinois Appellate Court spoke with regard to the removal of the pins and activation of the alarm is a

probability test. That is to say that the argument and the logic of this particular part of the opinion is that, given all the other circumstances of the defendants; (that is the defendants' presence at the scene of what was alleged to have been an attempted perpetration of a crime), the fact of the lack of activity in the surrounding area, as the Court pointed out in the following paragraph on p. 561 *supra,* the admission of an alleged bolt cutter (given the circumstances of this case in which there was no physical damage to the property alleged to have been caused by such a bolt cutter), that the totality of these circumstances makes it more probable than not that the defendants were there for the purposes of burglarizing the premises. However, the probability of a certain event occurring is quite clearly a test and a standard of persuasion which is exclusively found in civil cases, as this Court pointed out on p. 1072 in Winship when it discussed *Davis* v. *the United States,* 160 U.S. 468 and *Spieser* v. *Randall,* 357 U.S. 525. What the Illinois Appellate Court failed to consider properly is the fact that the reasonable doubt standard compels the State to go beyond the mere circumstances of the defendants' presence, the otherwise lack of activity in the surrounding area, and show directly or indirectly that some act of the defendants in furtherance of their intended plan to burglarize the premises caused the alarm to go off.

In essence, the Appellate Court overlooked the body of authority which distinguishes, with respect to crimes involving a charge of attempt to do a criminal act, the difference between perpetration and mere preparation. That is to say that mere preparation to do a criminal act is not, in and of itself, other than for a separate charge of conspiracy, a crime. Thus, the facts on which

the Illinois Appellate Court relied, in sustaining the defendants' conviction, are facts which can all be reconciled and are compatible with, at the worst, with respect to the defendants' case, mere preparation to commit a crime. Only the fact, if proved, that the defendants did remove the pins later found on the ground, and that their removal or some other activity connected with their removal, caused the alarm to go off would alter the conclusion to be drawn to one of perpetration.

Certainly the defendants would agree that if the State had proved the defendants had removed the pins, then under the existing law with respect to attempted burglary in Illinois, this would be sufficient to sustain their conviction of that crime.

Failure, however, of the State to have proven this creates only a probability that the defendants were at that premises at the time to commit an act of burglary. More importantly, without this evidence the State has merely proven what may be construed to be preparation by the defendants for the purposes of burglarizing the premises.

B) It is the contention of the defendants that evidentiary presumptions deserve the same careful scrutiny and protections afforded by this Court to statutory presumptions. This Court has dealt several times with the question of the validity of statutory presumptions to be used in criminal cases, in *United States* v. *Gainey,* 380 U.S. 63, *Tot* v. *United States,* 319 U.S. 463, *United States* v. *Romano,* 382 U.S. 136, *United States* v. *Leary,* 395 U.S. 6. Admittedly, these cases deal with statutory presumptions, however, it should be beyond question that evidentiary presumptions present the same problems with

respect to the due process clause of the Fourteenth Amendment.

The problem with respect to the random use of presumptions in a criminal case was rather thoroughly discussed in light of *Gainey, supra, Romano, supra,* and *Tot, supra* in *United States* v. *Adams,* 293 F. App. 776. Again, in *Adams* the Court was dealing with a statutory presumption. That Court said at p. 783 and 784:

> "No authority in any relevant context has ever suggested that the statutory inference was intended or may properly serve to lighten the prosecution's burden of proof beyond a reasonable doubt.
>
> And so when we allow the drawing of an inference, like the type herein issue, we must be telling juries (or ourselves as trier of fact) that the inference is one sustained by substantially more than the preponderance of evidence, that the probability is far in excess of fifty-fifty, that it is sufficient to warrant a reasonable man's being convinced to a moral certainty of the correctness of the inference."

The situation factually as presented in *Bean and Wilkinson, supra,* is less than the fifty-fifty reference in *Adams* within the terms of probability.

As we pointed out in argument A) of this writ the obvious and pivotal construction of the Illinois Appellate Court's opinion was the *unexplained* presence of the defendants at the scene. What the Illinois Appellate Court failed to consider and what we urge this Court in the strongest, but most respectful, terms to consider, is the lack of proof of a basic or initial fact with respect to the pins, so thoroughly discussed in section A) and section (e) of this writ, being in the rear door prior to the time

the defendants were discovered on the night of October 14, 1966.

As the defendant-petitioners indicated, the State could have easily done this by merely asking a hypothetical question either of Albert Guetler or perhaps even the police officer as to whether or not, given the removal of the pins, the alarm would have been activated. If this were the case, then circumstantially a fact would have been proved and the chain of evidence from which the trier of fact could reasonably infer that it was an act of the defendants which caused the alarm to be activated and/or the pins to be removed would have been established.

Instead, the Illinois Appellate Court chose to overlook this failure and indulge itself, as we pointed out, on p. 561 of its decision (found on p. 6 of this writ) in reasonable inferences, natural inferences and reasonable assumptions, all of which may well rest with some vitality in the civil law but none of which are satisfactory as presumptions to meet the standards that this Court has set out in *Gainey*, *Tot*, *Romano* and *Leary* and as thoroughly discussed in *United States* v. *Adams*, *supra*.

Thus, in effect, the Illinois Appellate Court has allowed the defendants' convictions to stand on an inference for which no initial fact was ever offered or proved by the State. Such a result is obviously not only in violation of the rules announced in *In Re Winship*, *supra*, but thoroughly disgraceful.

This Court has an absolute duty to prevent wherever and whenever possible courts of lower jurisdiction from their practices of indulging themselves in what they consider to be rules of evidence with regard to standards applicable in criminal cases.

The obvious, if somewhat inarticulated, underlying rationale which pervades the philosophy of these courts is that on the basis of their value judgments of the records, if they feel that the defendant or defendants are guilty, then the current popular attitude, as it were, with respect to law and order, compels that court to eliminate the expensive and burdensome process of retrial and dispense what it considers to be justice immediately by finding the defendants' convictions were for evidentiary purposes, sufficient beyond a reasonable doubt without so much as one iota of thought or consideration of the enormous violence that such wholesale distortions of the criminal law have as an effect on the standards of justice and due process under the appropriate clauses of the United States Constitution.

It should and must be remembered that with respect to our state and, in some cases, federal judiciary that judges without respect to qualifications, temperament and the like, are often blown on the benches just as specks of dust by a political wind and in order for this country and its legal system to survive what sometimes is an ill wind this Court must constantly and diligently police these decisions of the lower courts which are, in effect, an attempt to do violence to well established standards of criminal law.

Again, it is incumbent upon this Court to review the entire record and judge the facts in their total context as the Federal Appellate Court pointed out in *Adams, supra,* on page 74.

> "We cannot and must not abide convictions in criminal cases which overall require proof of a reasonable doubt and at the same time allow elements of the conviction to rest on presumptions which do not satisfy this standard."

CONCLUSION

In conclusion, petitioners pray that this Honorable Court will consider their complaints to be of sufficient constitutional magnitude to warrant this Court's review.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Court

MR. JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Defendants were convicted in a bench trial upon the charge of attempted burglary. Each of the defendants was sentenced to a term of one to three years. This appeal seeks the reversal of their convictions upon the alleged insufficiency of the evidence produced at their trial. The defendants contend the State failed to prove the corpus delicti of the crime of attempt and that the evidence failed to produce a reasonable and moral certainty of their guilt.

All of the evidence, of which a great deal is circumstantial, was introduced by the State. The defendants did not produce any testimony on their behalf. The record discloses that at 2:15 a.m., on October 14, 1966, a burglar alarm board in the Village of Lyons police station was activated. The location indicated was the Stitt-Reed Corporation on 44th Place in that village. The physical characteristics of this area are that to the west of the corporation was an open field enclosed by a fence. Another factory was located to the east. To the south, across 44th Place were other factories and to the north was a vacant lot and a stone quarry.

Police responded to the alarm by taking separate squad cars to the Stitt-Reed building. Officer Burton Stieg testified that he arrived at the front of the premises and checked the front door and rear door by pulling on the handles. The rear door is located on the north side of the building. Stieg then walked to the west side in order

to check some windows. At this point, the defendant, Robert Wilkinson, was discovered some 20 feet from the building, lying in the field to the west, in some tall grass. Officer Stieg related that none of the factories in that area were in operation at that hour of that day. Furthermore, the nearest tavern was four blocks away and the closest all-night restaurant was located one mile from the Stitt-Reed location. The officer did not notice any vehicles in the vicinity besides the police squad cars.

The testimony of Lieutenant Schiefelbein was admitted by stipulation. He investigated the burglar alarm call at the Stitt-Reed Corporation on October 14, 1966. This officer went up to the roof of the building with his flashlight and while shining the beam into the field to the west discovered the defendant Harold Bean. He was then arrested and Officer Schiefelbein also discovered what was described as a bolt cutter, commonly used for cutting metal bolts, within three to five feet of Bean. The instrument was admitted into evidence.

The State called Albert Guetler who was Vice-President of Stitt-Reed at the time in question. He testified that on October 13, 1966, he locked all of the windows and doors of the corporation at the close of that business day, at approximately 4:30 p.m. Guetler returned to the premises at 3:00 a.m. the next morning in response to a call from the police. He said he examined the rear door and discovered that the pins on the hinges had been removed. On cross-examination, this witness stated that the pins had been removed in one piece by pushing them out of the hinges. Guetler admitted that he did not go to the outside when he locked the rear door on October 13, 1966. When asked whether he knew if the pins were in the door at that time, he responded: "I can best answer you this

way: Had the pins been removed, the door wouldn't have locked."

At the conclusion of the State's case, defendants' counsel moved for a directed finding of not guilty. After extensive argument, the motion was denied by the trial judge who felt that sufficient circumstantial evidence had been presented. The defendants then rested their case and the trial court entered a finding and judgment of guilty as to both defendants.

The crime of attempt is defined in Illinois Revised Statutes, Chapter 38, Section 8-4 as follows:

> "(a) Elements of the Offense. A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."

The defendants argue that all of the evidence in the instant case does not prove conduct which amounted to a substantial step toward committing a crime. They contend that the evidence at best shows preparation only. According to defendants' theory, the only direct testimony was that defendants were present at the scene when the police officers responded to a burglar alarm. Defendants assert there was no physical damage to the building that proved a substantial step in committing the offense as charged. The argument also points out that the State did not prove what had activated the alarm; that the State failed to show that the pins were present when the building was closed the night before; and that the State did not connect the alleged bolt cutter to the removal of the pins from the hinges.

The State answers these contentions by stating that the removal of the pins from the rear door was a substantial

step toward committing the crime of burglary. We are in accord with the State on this question. The determination of what constitutes the crime of attempt is a matter of degree, depending upon the circumstances of each case. In our opinion, the removal of the pins from the hinge of this door left only the removal of the door from its place as the final step in entering this building. The more important question is the issue of whether the evidence presented proved that the defendants were the persons who had removed these pins in order to burglarize the premises.

In most cases of this nature, proof of the crime must necessarily be based upon a great deal of circumstantial evidence. This case is no exception. The record in this appeal discloses that the trial judge relied upon several inferences in determining the defendants' guilt. The State contends that these were reasonable inferences which proved the defendants' guilt beyond a reasonable doubt. The State's contentions were summarized as follows:

> "It sorely tests the imagination to conceive of any other possible reason why two men would be lying in the deep grass with a three foot bolt cutter near one of the defendants, in the early morning, behind a building where the burglar alarm had gone off just minutes before, with no car nearby nor any other neighborhood buildings open, except that they were trying to hide from the police after an abortive attempt to enter the building."

The defendants have cited many decisions to justify their position. Since the determination of this question must depend upon the facts of this case, we find these cases as factualy inapplicable. However, the principles announced will aid our decision. In *People* v. *Magnafichi,* 9 Ill. 2d 169, 137 N.E. 2d 256 (1956), a burglary convic-

tion based on circumstantial evidence was set aside. The Supreme Court stated at page 173 as follows:

> "To justify a conviction, circumstantial evidence must be of such a nature as to produce a reasonable and moral certainty that the accused committed the crime. Where the circumstances can be explained upon a reasonable hypothesis consistent with innocence and leave a serious and grave doubt of guilt, a conviction cannot stand."

The *Magnafichi* court also noted that because of the presumption of innocence, a defendant need not explain his presence in the vicinity where a burglary occurred. *People* v. *Connie,* 52 Ill. App. 2d 221, 201 N.E. 2d 641 (1964) and *People* v. *Dougard,* 16 Ill. 2d 603, 158 N.E. 2d 596 (1959) hold that it is the duty of a reviewing court to resolve all the evidence on the theory of innocence rather than guilt if that may be reasonably done.

We are completely in accord with these principles. However, we are in disagreement with the defendants as to their contentions. In our opinion, this record contains substantial circumstantial evidence which only leads to the conclusion that defendants were proved guilty beyond a reasonable doubt. The record shows that the trial judge had to rely upon reasonable inferences from the evidence presented. According to the case of *People* v. *Jackson,* 98 Ill. App. 2d 296, 240 N.E. 2d 482 (1968), at page 302, "the trier of fact is not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt." Similarly, our Supreme Court has expressed this same principle in connection with jury determination in *People* v. *Russell,* 17 Ill. 2d 328, 161 N.E. 2d 309 (1959).

The trial judge relied upon several natural inferences in finding the defendants guilty. The record shows that

the defendants were arrested within close proximity to a building where a burglar alarm had sounded. It can be reasonably inferred that the removal of the pins activated the alarm. We think that the trial judge was correct in ignoring the inference sought to be presented by the defendants that no proof was shown that the pins had not been removed prior to the early morning of October 14, 1966. The fact that Guetler checked the rear door on October 13, 1966, but failed to observe the outside of the door where the hinges are located does not lead to the conclusion that the pins were not present. It can reasonably be assumed that had they been removed on October 13, 1966, the burglar alarm would have sounded.

Furthermore, the testimony was that there were no places of business in the near vicinity that were open at the time the defendants were arrested. Although the defendants were not obligated to explain their presence at the scene, this circumstance when considered with the other facts weighs heavily against their innocence. The admission of the alleged bolt cutter found near defendant Bean was a substantial factor for the Court's consideration even though it was not asserted that the instrument was used to commit the offense. *People* v. *Hahn,* 90 Ill. App. 2d 367, 234 N.E. 2d 142 (1967).

We are of the opinion that the trial judge drew reasonable inferences from the evidence presented. In our review of the record we have not experienced that grave and substantial doubt of the defendants' guilt that would require reversal of these judgments. *People* v. *Sheppard,* 402 Ill. 347, 83 N.E. 2d 587 (1949). Therefore, the judgments of the Circuit Court of Cook County are affirmed.

JUDGMENTS AFFIRMED.

BURMAN, P. J., and MURPHY, J., concur.